

1989

Ronald L. and Shirley Diane Baxter, husband and wife, vs. Utah Department of Transportation vs. David County Commissioners; Davis County Assessor; Davis County Recorder; and Weber County, a body politic of the State of Utah: Brief of Plaintiffs-Appellants

Utah Court of Appeals

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STATE COURT OF APPEALS
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

RONALD L. and SHIRLEY DIANE
~~DOXTER~~, husband and wife,

Plaintiffs-Appellants,

vs.

UTAH DEPARTMENT OF TRANSPORTATION,

Defendant and Third-Party
Plaintiff-Respondent,

vs.

DAVIS COUNTY COMMISSIONERS; DAVIS
COUNTY ASSESSOR; DAVIS COUNTY RECORDER;
and WEBER COUNTY, a body politic of
the State of Utah,

Third-Party Defendants.

89-0175-CA

No. 860562

Priority No. 13(b)

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal from Judgment of the Second District Court of Weber County
Honorable Ronald O. Hyde

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ISSUES PRESENTED ON APPEAL

1. Under applicable law determining river-designated boundary lines between counties, did defendant prove by a preponderance of the evidence that the subject property was located north of the Weber River (i.e., in Weber County) on January 10, 1866.

2. In any event, is defendant precluded by estoppel from denying the Davis County source of its claimed title to the subject property.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiffs Baxter appeal from a Judgment entered in this matter purporting to quiet title to a six-acre tract of land in defendant Utah Department of Transportation. In their Complaint, plaintiffs set forth a Davis County Tax Deed as the basis for seeking to have title quieted in their names; defendant responded with an Answer containing an Affirmative Defense which asserted that the subject property was located in Weber County and that Davis County had no authority to levy taxes thereon.

The dispute in this litigation involves a determination of whether the subject six-acre tract of land was located in Davis County or in Weber County when their common boundary line was established on January 10, 1866.

B. Course of Proceedings and Disposition in Lower Court.

A non-jury trial was held before Ronald O. Hyde, District Judge, on August 26-27, 1986. Judgment was entered on October 6, 1986. Notice of Appeal was filed and entered on November 4, 1986. Plaintiffs by this appeal seek to have the Judgment reversed and to have title to the subject property quieted in themselves.

C. Statement of Facts.

On May 26, 1969, plaintiff Ronald L. Baxter, together with Ronald Toone and Thomas Hollberg, purchased an 18-acre tract of land at tax sale from Davis County, each acquiring an undivided one-third interest as tenants-in-common. The land was described as--

S $\frac{1}{2}$ of N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Sec. 25, 5N, 1W, SLM,
cont. 18.00 Acres in Davis County,

Serial No. S.W. 3

(Exh. P-2)

In 1970, they divided the 18 acres by quit claim deeds, resulting in plaintiffs (hereinafter referred to as "Baxters") acquiring the six-acre tract which is the subject of this litigation (Exhs. P-3, P-4 and P-5; R. 411 -413).

The chain of title to the 18-acre tract reveals that Tasma P. Dansie filed a quiet title action in the Second District Court of Weber County, and in 1946 she secured a Decree quieting title to various lands, separately described as being in either Weber or

Davis County. The 18-acre tract was specifically described in the Decree as being in Davis County(R.405-406). On March 10, 1961, Tasma P. Dansie conveyed the 18-acre tract to Robert Rees Dansie and his wife, but the document was not recorded until April 13, 1964 (R. 409).

On May 14, 1964, Robert Rees Dansie and his wife conveyed the subject property (and other lands) to State Road Commission of Utah, predecessor to defendant Utah Department of Transportation (hereinafter referred to as "UDOT"), which prepared the Warranty Deed. However, that document departed from prior conveyances in the chain of title and recited for the first time that the subject property was located in Weber County (Exh.D-23). When the Davis County Recorder refused to record the deed so as to show the subject property being in Davis County, counsel for UDOT erased "Weber County" and substituted "Davis County" on the document, and it was recorded on March 31, 1975 (Exh. P-12).

All of the referenced title documents were duly recorded in the Recorder's office in Davis County.

Because record title to the subject property was in the name of Tasma P. Dansie on January 1, 1964, the failure of anyone to pay 1964 real property taxes resulted in the 1969 Davis County tax sale.

During the early spring of 1978, respondent and/or its contractor entered upon the subject property for the purpose of removing gravel-type materials, whereupon appellants filed a Notice of

Claim pursuant to Section 63-30-6, Utah Code Annotated (as Amended 1965), seeking to quiet title to the subject property. No action was taken on the claim, and the Complaint in this matter was filed in the Second District Court in and for Davis County in 1979 (R.1-5).

Baxters pleaded the Davis County Tax Deed in their Complaint as the basis for quiet title relief. UDOT then filed its Answer containing a general denial and, in addition and by way of defense, affirmatively alleged that the subject property was located in Weber County (R. 62-66).

UDOT in furtherance of its affirmative defense, filed a motion in the Second District Court of Davis County to have the matter removed to the Second District Court of Weber County. Judge Douglas Cornaby transferred the case since the subject property at the time of his Order (R. 33-35) was located on the north side of the Weber River, ostensibly providing a jurisdictional basis for Weber County court proceedings on the issue of the boundary line between the two counties.

Respondent then moved for Summary Judgment before Judge Calvin Gould in the Second District Court of Weber County, contending that (among other things) appellants were collaterally estopped from bringing this action because plaintiff Ronald L. Baxter appeared as an expert witness in a gravel-removal case between Ronald L. Toone

and Johnson Construction Company involving an adjoining property. Judge Gould ruled in favor of UDOT, and Summary Judgment was entered on March 3, 1983-- together with a subsequent Final Order entered on or before April 9, 1983, purporting to quiet title to the subject property in UDOT. Plaintiffs appealed the Summary Judgment and Final Order to this Court.

On August 26, 1985, the Supreme Court of the State of Utah reversed (Case No. 19097, cited as 705 P. 2d 1167), and the case was remanded to the trial court for further proceedings.

A Pretrial hearing was held before Judge David Roth on August 4, 1986 (Exh. P-20 , which is a complete transcript of the Pretrial hearing on that date) subsequent to his Ruling denying UDOT's Motion for Summary Judgment based upon an 1894 survey of the then-location of the Weber River-- which UDOT asserted to be the boundary line between the two counties-- and he held that the boundary between Weber and Davis counties was established by the legislature of the Territory of Utah as the main channel of the Weber River in the area of the subject property as it existed when the two counties were created in 1866 (R.456-458, and Exh. P-20 at pp. 38-43).

Judge Roth adopted his written Ruling on Motion for Summary Judgment dated May 21, 1896, as supplemented at his direction with portions of the Pretrial transcript (Exh. P-20 at p.40; and Addenda I and II) as the Pretrial Order, holding that the issues set for trial were to be decided by determining whether the subject property, as of

1866, was located on the south (i.e., Davis County) side or the north (i.e., Weber County) side of the main channel of the Weber River.

In addition, and as a further supplement to the Pretrial proceedings, Judge Roth ruled in a Memorandum Decision that UDOT, by reason of its Affirmative Defense to the Complaint, had the burden of proving that the subject property was located in Weber County in 1866.

The matter went to trial on August 26, 1986, before Ronald O. Hyde, District Judge, sitting without a jury. The uncontradicted evidence established that, as of January 10, 1866, when the boundary line between the two counties was established, the subject property was located on the south (i.e., Davis County) side of the Weber River and that not a trickle of the Weber River waters flowed on the south side of the subject property. However, taking a position contrary to Judge Roth's Pretrial rulings, Judge Hyde found that the "exact" location of the Weber River in the general area of the subject property could not be determined, that the present county surveyors and engineers were unable to furnish a "description" of the river's location in 1866-- there being no survey of the river location prior to 1894-- and that the boundary line between the two counties should therefore be established in the location where the Weber River was flowing in 1894 (and where it is flowing today) in accordance with the 1894 survey (R. 485, and Addendum III).

Further, and again proceeding contrary to Judge Roth's Mem-

orandum Decision supplementing his Pretrial rulings, Judge Hyde held that plaintiffs failed to prove by a preponderance of the evidence that the subject property was located in Davis County as of 1866 (R. 485; and see Addenda III and IV).

Official U.S. Surveyor General surveys which were run in the years 1855, 1871 and 1886 placed the main channel of the Weber River as it flowed from east to west to where it crossed the west (i.e., north-south) line of Section 25 at a point a few hundred feet northwest of the subject property to be 34.5 chains (2,277 feet) north of the southwest corner of Section 25 (Exhs. P-1, P-15, P-16 and P-17; and Exhs. D-14, D-15, and D-16). Subsequent to 1886, and prior to 1894, a sudden change in the river resulted in the channel being located on the south side of the subject property, crossing the west line of Section 25 at a point only 715 feet north of the southwest corner of 25-- an avulsive shift of 1,562 feet (Exh. P-1; and Exhs. D-2, D-4, D-5, D-12, D-17, D-18, D-19, D-20 and D-21).

Judge Hyde thereupon ruled consistent with UDOT's contentions that there was no prior survey which described the location of the Weber River east of the section line by metes-and-bounds and adopted the metes-and-bounds description made by the surveyors of the respective counties in 1894 as being the 1866 boundary line between the two counties. Judgment was entered for respondent UDOT upon the basis that the subject property was and is located in Weber County (R.521, and Addenda IV and V-- Findings of Fact and Conclusions of Law and Judgment).

SUMMARY OF ARGUMENTS

The lower court's findings relative to the location of the Weber River in 1866 are clearly erroneous and contrary to the evidence, and they are insufficient and inadequate in that they fail to address the primary issue in this case as framed at Pretrial-- and which comports to law-- to-wit: Where was the location of the Weber River in 1866 in relation to the subject property; that since the evidence conclusively established that the subject property was located south of the Weber River in 1866-- and absent a necessary contrary finding-- the Judgment must fail for lack of both factual and legal support.

Furthermore, since UDOT asserted that the subject property was located in Weber County by way of Affirmative Defense to the Complaint, Judge Roth made an additional Pretrial ruling that the burden of proving that the subject property was located in Weber County in 1866 was upon defendant UDOT; that UDOT failed to meet its burden, and made no attempt to do so, and even if the findings of the lower court be taken at face value, they contradict and destroy the type of proof necessary to support UDOT's burden in this case.

That UDOT's attempt to establish the location of the Weber River (and the common boundary line between the two counties) at its location south of the subject property, where it was flowing in 1894, must fail. Although contended by UDOT, and adopted by the trial court, that an 1894 courses-and-distances survey of the meandering

Weber River in the area of the subject property was made pursuant to a statute providing for a resolution of boundary-line disputes between counties, the survey failed to do so because (a) it was a first-time survey made by the county surveyors at the instigation of Davis County for the purpose of preparing a county-wide map which would show major physical features, (b) the surveyors did not erect monuments along the river in the area of the subject property, (c) the surveyors made no attempt to take into account the sudden and substantial (avulsive) channel change due to natural or man-made events which occurred between 1886-1894 and caused it to abandon its old channel, (d) neither county subsequently ratified or accepted the survey as establishing the common boundary, (e) there was and is no evidence that the 1894 survey was made for the purpose of resolving a disputed or uncertain boundary line (as mandated by the statute), and (f), in any event, the survey did not attempt to locate the location of the Weber River boundary "as... now established by law" (i.e., as of 1866).

Finally, as bearing on the county-situs of the subject property and as establishing a separate and independent basis for reversal, recitals in the chain of title to the subject property all placed the land in Davis County, until the chain was first broken by Dansie's deed to UDOT in 1964 wherein the situs was recited as being in Weber County-- the event which gave rise to this litigation; therefore, by reason of the doctrine of estoppel by deed, which

prohibits contesting claimants from denying material recitals in conveyances from a common-source grantor, UDOT is estopped from denying that the subject property is in Davis County.

ARGUMENT

I.

THE UNDISPUTED EVIDENCE ESTABLISHED THAT, AS OF JANUARY 10, 1866 AND UNTIL AT LEAST 1886, THE ENTIRE FLOW OF THE WEBER RIVER WAS NORTH OF THE SUBJECT PROPERTY, THEREBY PLACING IT IN DAVIS COUNTY.

The boundary line between Weber and Davis Counties was established by the location of the Weber River as of January 10, 1866, as set forth in Compiled Laws of Utah of 1876, Sections 156 and 157, and thereafter adopted by Article XI, Section 1 of the Constitution of the State of Utah:

"(156) Sec. 14.

... a line running east from a point (on the eastern shore of the Great Salt Lake) to a point in the centre of the channel of the Weber River due north from the northwest corner of Kingston's Fort, thence up the centre of said channel to a point opposite the summit of the Wasatch Mountains,..."

Critical to an analysis of the location of the Weber River in 1866 is the fact that this is not a lawsuit between Davis and Weber Counties seeking to establish the location of the Weber River for some extended distance for general county purposes. Rather, this litigation involves a dispute between what in effect constitutes two private litigants, each claiming title to a six-acre tract of land. The foregoing distinction brings to the fore two entirely

different approaches to the problem made by Judge Roth, who conducted the Pre-trial, and Judge Hyde, who tried the case.

The central theme adopted by Judge Hyde in his Memorandum Decision and his Findings of Fact was that "an exact location of river in 1866 cannot be placed," and that there was "an uncertainty as to the location of the river" inasmuch as official U. S. Surveys of the river location along the west line of Section 25 "did not describe the location of the river east of the section line," and that, therefore and because no prior surveys of the river had ever been made, an 1894 survey of the then-existing channel of the Weber River made by the surveyors of the two counties established the boundary line between the two counties.

On the other hand, Judge Roth ruled at Pretrial (Exh. P-20 at pp. 38 and 43) and in his Ruling on Motion for Summary Judgment (R. 456), adopted by him as a portion of his Pretrial Order (Exh. P-20, p. 40), that the issue involved a determination of whether the Weber River in 1866 was located north or south of the subject property.

Baxters prepared their case and presented evidence at trial in accordance with Judge Roth's Pretrial rulings, proving that the Weber River was located north of the subject property in 1866. UDOT disregarded the three-part Pretrial Order and presented evidence at trial along lines adopted by Judge Hyde in his Memorandum Decision and Findings of Fact. It should be noted that Judge Hyde avoided any

reference to the 1866 river location in relation to the subject property

The U.S. Surveyor General conducted official surveys of the west (i.e., north-south) line of Section 25 in 1855, 1871 and 1886 (Exhs. P-15, P-16 and P-17). The field notes of the surveys carefully delineated every physical feature along the survey route, including each watercourse encountered. The 1855 survey showed a small river channel only .40 chains (26 feet) wide at a point 22.60 chains north of the SW corner of Section 25. At 32.70 chains the river was encountered again, after crossing an "island," and the river was crossed at 34.50 chains--1.80 chains (118 ft.) wide (Exh. P-16).

The 1871 and 1886 surveys also encountered the small channel, but the field notes designated it as an "old river bed." Significantly, the largest river channel was again found at 34.50 chains (1871) and 34.75 chains (1886)--Exh. P-1, reproduced on opposite page.

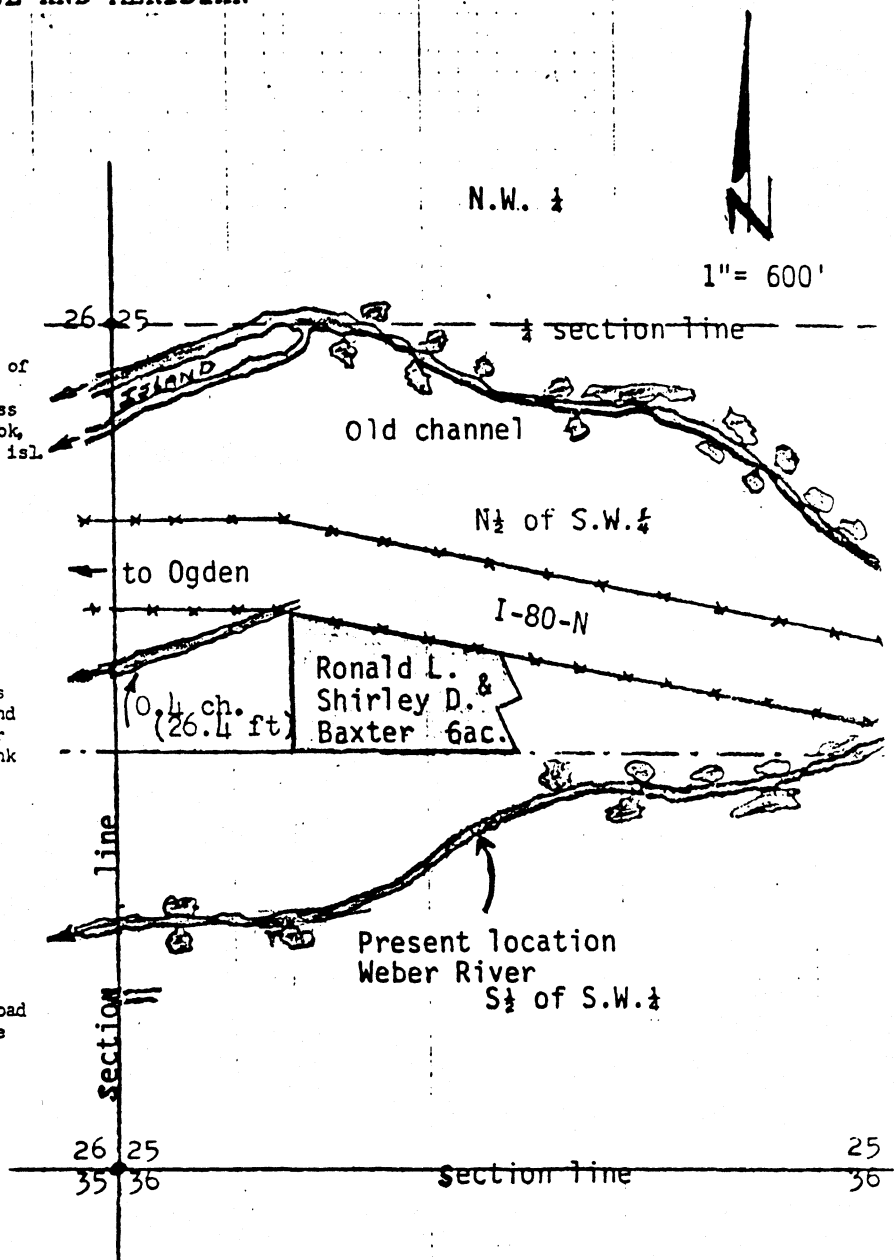
(See Addendum VI for excerpts from U.S. Survey field notes)

In addition to the field notes, the U. S. Surveys were accompanied by maps prepared by the surveyors which showed the location of prominent physical features in the area. For instance, in 1855-- just eight years after Utah was first settled-- the location of the river channel as it coursed from east to west across Section 25 was plotted, as well as adjacent mountains. And in 1871-- just two years after the transcontinental railroad ran down Weber

EXHIBIT P-1 -- U. S. Surveys

SOUTHWEST $\frac{1}{4}$ OF SECTION 25, T.5 N., R.1 W.
SALT LAKE BASE AND MERIDIAN

1886	1871	1855
40.0 ch. fnd. old corner 39.25 ch. No. bank of river 38.25 ch. leave Weber River--1 ch. wide, 2 $\frac{1}{2}$ ft deep 36.25 ch. Island 34.75 ch. Weber River 1.25 ch. wide 3 ft. deep, runs SW wide, flows Soft	43.25 U.P.R.R. E-W 40.0 ch. set qtz. stone for $\frac{1}{4}$ cor. 38.0 Across island N. br. Weber River 1.25 ch. wide S/W 34.5 ch. Weber River 1.50 ch. wide, flows Soft	36.0 ch. ft. of high bluff 34.5 ch. cross river to rt bk. 32.7 ch. crs isl. 23.0 ch. cross river to island 22.6 ch. Weber River left bank 9.0 ch. To Road 50 links wide
25.0 ch. Old bed of River drains SW 20.25 ch. Road E-W	25.0 ch. old river bed bears Soft	

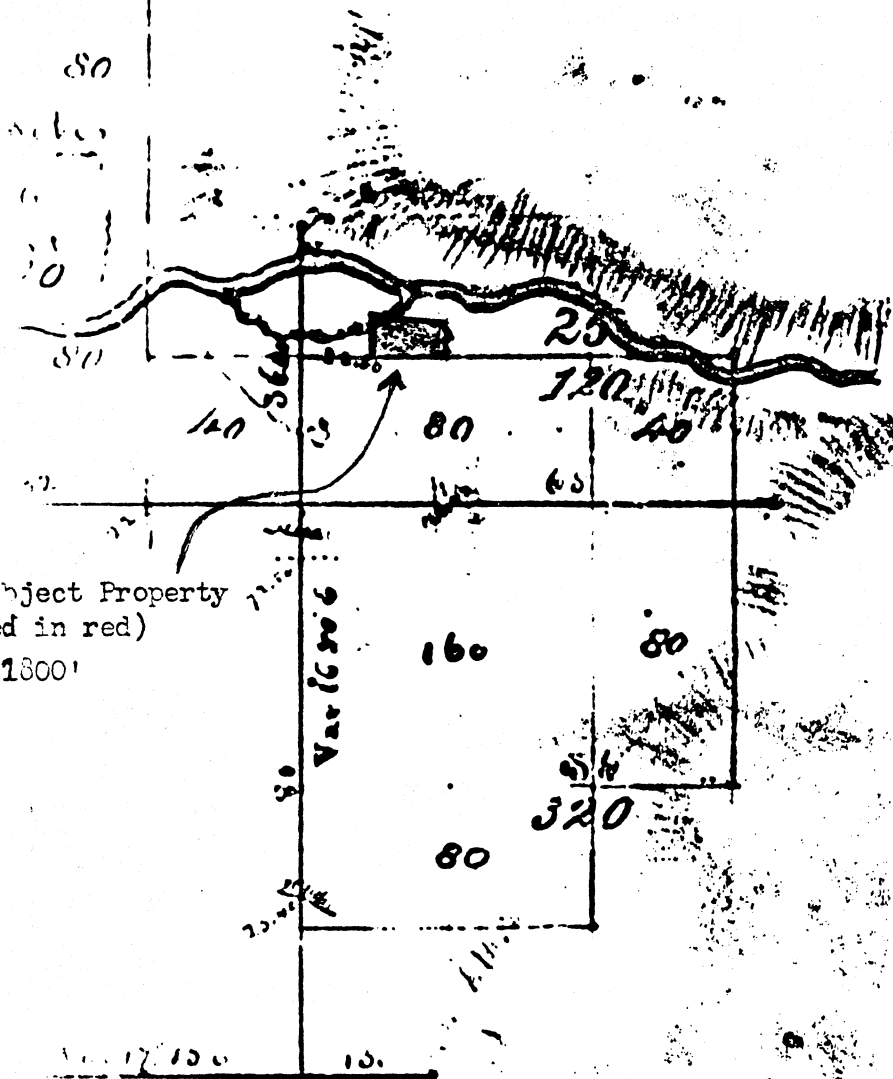


Traversing North along section line
between sections 25 & 26, starting at
Southwest corner of section 25.

Note: This reproduced copy of "EXHIBIT P-1" drawn from certified handwritten field
notes recorded in the United States Land Office. Entered as EXHIBIT P-1 in
2nd District Court trial, Weber County, Utah.

67

50



Scale: 1" = 1800'

Surgeon General's Office
Salt Lake City, Dec 21st 1900

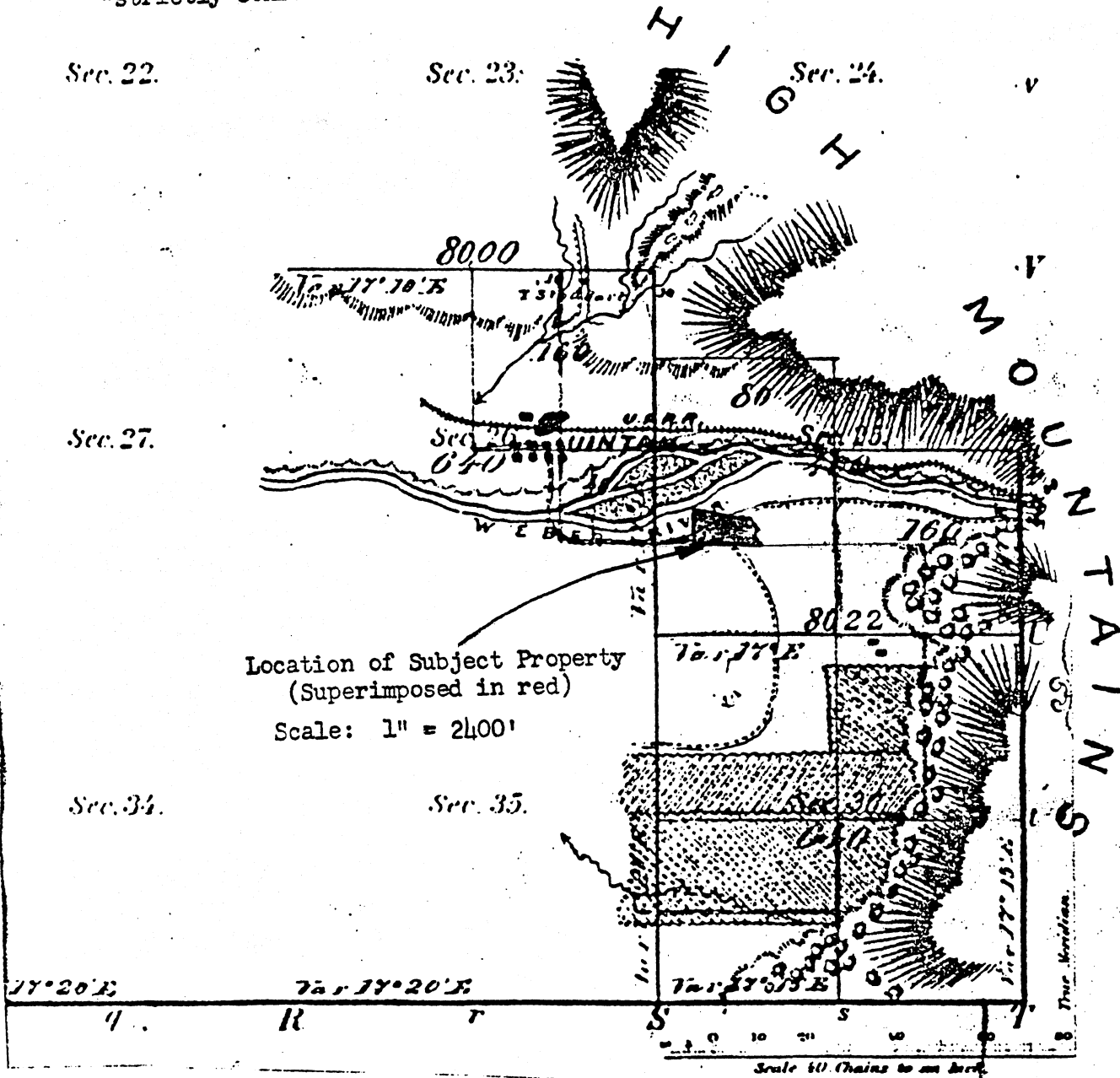
This Map of Township N. 8 North of Range N. 8 West of Salt Lake Meridian is strictly conformable to the field notes of the survey thereof on file in this office which have been examined and approved.

David J. Barr

Surveyor General of Utah

EXHIBIT D-15

1871 Map of portion of W $\frac{1}{2}$ of Section 25 prepared by Surveyor General
"strictly conformable to the field notes" of the S. S. Survey.



The above Map of Township 12S North of Range 12W West
Salt Lake Meridian Utah Territory is strictly conformable to the field
notes of the survey thereof on file in this Office, which have been examined and approved.

Surveyor General's Office
Salt Lake City Utah
April 13th 1871

[Signature]
Sur. Gen.

Canyon-- the surveyors plotted the location of the river in relation to the U.P.R.R., minor streams, the east-west quarter section line, adjacent mountains and existing roads (See Exhs. D-14 and D-15, reproduced at pp. 14 and 15, and Exh. D-16, reproduced in Addendum VII)

Although Judge Hyde felt the location of the Weber River to the east of the west line of Section 25 was not described, it is submitted that, for the purpose of locating a boundary line between two counties which is designated as a river-- subject to ordinary minor sidewise movements (i.e., relictions and accretions)-- the surveys and maps were the very best evidence available under the circumstances. It should be noted that the survey maps were certified by the Surveyor General of Utah as being "strictly conformable to the field notes" of the surveys.

The Weber River flowed across the SW $\frac{1}{4}$ prior to 1894 against and below the hillside, and substantially parallel to the U.P.R.R. tracks. In addition to the U.S. Surveys, a private map prepared in 1890 (Exh. P-6) by the "Wyoming and Western Railway" and filed in the book of Private Surveys of Davis County, shows the Weber River in the same location where placed by the U.S. Surveys, as well as the location of Kingstons Fort.

The pre-1894 river channel across the SW $\frac{1}{4}$ of Section 25 has always been marked by a distinct row of large trees, as marked on

the 1871 U.S. Survey Map and on all of the aerial photos: Exh. D-17 (1937), Exh. D-19 (1946), Exh. D-18(1952), Exhs. D-20 and P-1 (1958) and Exh. D-21(1965). The line of trees shown on the U. S. Surveys and on all aerial photos coincide with the Weber River location in 1855, 1871 and 1886. The line of trees exists today, showing the old-channel location in clear detail.

If the exact location of the Weber River in the general area had been contemplated by the territorial legislature, it easily could have adopted a line which could have been, or which then was, determined by reference to the U.S. Survey that had been completed in the area. See San Juan County v. Grand County (1962), 13 Utah 2d 242.

UDOT contended that there was no "main channel" of the Weber River prior to 1894 (Exh. P-20 at p.23), but the facts and law are otherwise. All three U.S. Surveys found a small river channel at approximately 25.0 chains north of the SW corner of Section 25-- only 26 feet wide and dry in 1871 and 1886. On the other hand, all three surveys encountered the main channel of the Weber River at 34.5 to 34.75 chains north of the Section corner-- a river 1.25 to 1.50 chains (82 ft. to 100 ft.) wide and flowing between 2½ and 3 feet deep.

Main Channel

That bed of the river over which the principal volume of water flows. Many great rivers discharge themselves into the sea through more than one channel. They all,

however, have a main channel. Packet Co. v. Bridge Co. (C.C.) 31 F.757. Compare State of Oklahoma v. State of Texas, 258 U.S.574, 42 S. Ct. 406, 414, 66 L. Ed. 771.

Black's Law Dictionary, Third Edition,
pp. 308-309

.

It is difficult to define the 'main channel' of a river with precision, but it is sufficient to say that it is that bed of a river over which the principal volume of water flows...

Words and Phrases, Vol.26, p.62

Of even greater significance, however, the location of the subject property, as superimposed in red on Exhs. D-14, D-15 and D-16, is located south of the entire Weber River system as it existed in 1866, thereby making any issue as to what channel may have been the main channel a moot issue and clearly establishing the location of the subject property as being in Davis County in 1866.

The oldest Davis County Assessors Plat Map of Section 25 shows the old river location in substantially the same location as set forth in the three U. S. Surveys and maps. The subject property (marked with a red arrow) was then owned by Tasma Dansie, and it was located south of the Weber River-- in Davis County. (See Exh.P-7 reproduced on opposite page.

SW $\frac{1}{4}$ of Section 25

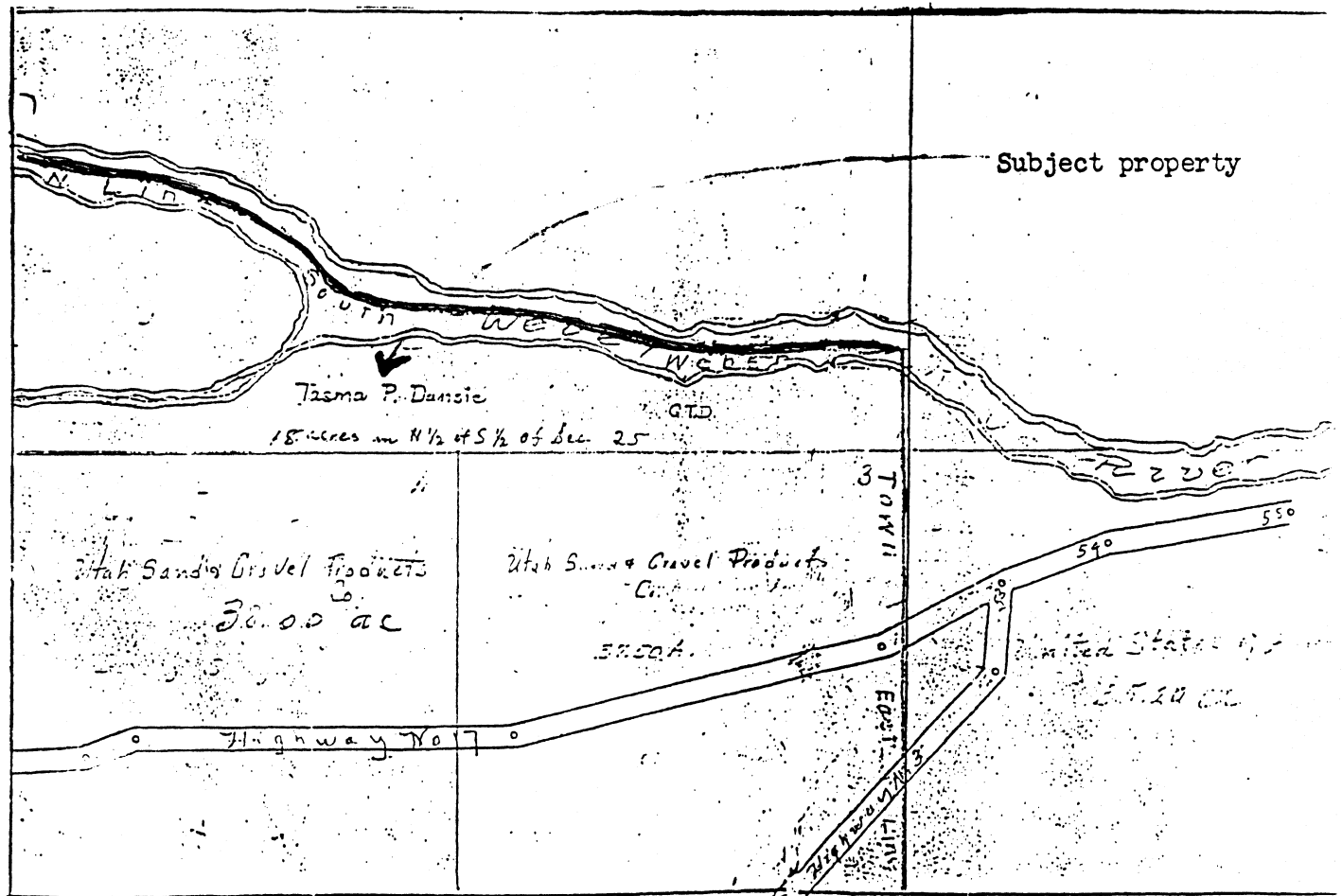


EXHIBIT P-7

Taken from "Assessors Plat Maps" book of Tp. 4-5 N. R. 1 W.
Davis County Recorder's Office

- The location of the Weber River is shown as it existed prior to the channel change which occurred between 1886 and 1894.
- Arrow indicates location of subject property--superimposed on the Exhibit.
- Coloration appears on original Exhibit.

The surveyors and engineers who testified at trial all agreed on examination by plaintiffs' counsel that no portion of the Weber River waters were flowing on the south side of the subject property in 1866:

UDOT's witness Max B. Elliott, Davis County Surveyor --

Q. But in any event, you found the river up near that area in all three years, didn't you?

A. Found it further north than it is on that map, that's correct.

Q. My other question, in any of the surveys conducted by the United States Surveyor General, in either 1855, 1871 or 1866, did you find in any of those surveys, any water of the Weber River located south of the Baxter tract shown on Exhibit P1?

A. Not on those notes.

Q. Not a drop of water to the south, did you?

A. No.

Q. All of the Weber River water shown was somewhere to the north of the Baxter tract, wasn't it?

A. On those notes, that's correct.

Q. On those notes. And until 1894, you found no indication of water south of the tract until that '94 survey came about, did you?

A. I found nothing on that prior to the 1894 survey, that's correct.

(Tr. 27-28 -- R. 580-581)

UDOT's witness John P. Reeve, Weber County Surveyor--

C. But you didn't find any water as of 1855 or 1871 flowing on the south of this property, did you?

A. No.

(Tr. 76 --R. 629)

UDOT's witness Jack L. DeMass, an engineer and surveyor--

Q. All right. As to Exhibit 9, which is this chart that has been prepared-- I think you've stated this was your work?

A. Yes.

Q. And if I read the chart correctly and relate it to Plaintiff's Exhibit 1, the chart does not indicate in any respect that the Weber River water or any portion of it was flowing south of the subject property at least through 1886?

A. If I can clarify that. None was flowing there during the two weeks in October when they made the survey.

Q. Yes.

A. Not to say that it wasn't there during the year. I did not agree with that.

Q. All right. Did you find anything in the Surveyor General's notes to indicate that there were old channels south of the channel located some 22 chains north of the section corner of this southwest corner?

A. No.

Q. No channels were indicated, were they?

A. No.

(Tr. 93-94--R. 646-647)

Plaintiff Ronald L. Baxter, an engineer and surveyor--

Q. Now some general questions. On the three surveys that you ran or that the government ran, excuse me, and that you plotted, did you find any river indication that was common to all three surveys?

A. Yes. The area at approximately 34 and a half chains showed the main channel of the Weber River on all three surveys with slight variance.

(Tr. 156-157--R.709-710)

.

Q. Now, as you have reviewed the survey notes for all three years, was there any indication up through 1886, that there was any portion of the Weber River at a point roughly 715 feet north of the southwest quarter of section 25?

A. No, there was no river in that location at that time.

Q. None at all?

A. None.

Q. Do the notes in any respect reveal from a point south of 22.6 chains north of the section corner, any old river channel between there and the southwest quarter of the section?

A. None. (Tr. 158 -- R. 711)

.

THE WITNESS: Yes. From all I can determine from the notes, the main channel of the Weber River was approximately 600 feet north of the subject property.

Q. (BY MR. FULLER) And that's on a due north/south bearing?

A. Yes. (Tr.166-- R. 719)

Although there was no legal description showing the exact location of the Weber River where it flowed in 1866, and while the surveyors disagreed as to which of three river channels constituted the main channel of the river in 1866, on the critical issue in the case there was no disagreement: All three river channels were flowing on the north side of the subject property in 1866.

There is no evidence in this case which even suggests that any portion of the waters of the Weber River flowed anywhere but on the north side of the subject property in 1866.

Two Utah cases have addressed the issue of disputed county lines where not tied to the U. S. survey system. In the case of Barton v. Sanpete County (1916), 49 U. 188, 162 P. 611, the territorial legislature tied the division line between Juab and Sanpete Counties in the area of Barton's lands to "a point east of the place where the Gunnison road crosses the divide between Chicken creek and Sevier river; then in a straight line southwesterly to the upper bluff rocks at the south end of Cedar Ridge."

As anyone knowledgeable about legal descriptions would recognize, and as was noted in the decision, the description was fatally flawed since there was no way of fixing the location of the "point" which was east of where the Gunnison road crossed the divide.

The State Engineer tried to establish the boundary-line where he "thought" it should be according to the procedure for resolving disputes provided by state statute, but the matter eventually was placed before the Utah legislature, which amended the boundary-line description. When the matter finally reached the Utah Supreme Court, it was held that the original boundary line was "a floating, or, to be more exact, an unidentified" boundary, and that the legislature acted properly in the circumstances:

...The legal effect of what was done by the Legislature was merely to determine and fix the originally contemplated territorial limits of the two counties. No territory was therefore annexed to one or stricken from the other county, and hence the constitutional provision has no application here.

The Barton case was critically analyzed and its ruling strictly limited to the facts of that case in Summit County v. Rich County (1921), 57 U. 553, 195 P.639. In the Summit County case the county-boundary description where it followed the Union Pacific Railroad was claimed to be indefinite, and the matter thereupon was placed before the Utah legislature, which proceeded to establish a boundary line.

In holding the legislative action unconstitutional, the Utah Supreme Court made the following observations and rulings:

... If it had appeared in the Barton Case, upon a comparison of the original boundary line, with the boundary line established by the Legislature in 1913, that the Legislature had manifestly ignored a plain indubitable line marked by a transcontinental railroad for a distance of approximately four miles, thereby shifting the railroad from one county to another, together with thousands of acres of lands and their inhabitants, the writer is of the opinion that the court would have held that the act was unconstitutional and void....

P. 643

and,

We cannot, however, close our eyes to the fact that the Legislature which originally defined the boundary line between Summit and Rich counties, according to the complaint, manifestly intended that the north side of the Union Pacific Railroad should constitute the boundary line between the two counties for a distance as above stated of approximately four miles...

P. 644

Further, and with respect to establishing exact descriptions of all boundaries such as could be ascertained by engineering skill, the Court observed:

It is not our province on this appeal to determine, or attempt to determine, the exact location of the true boundary line at all points between the two counties.

P. 643

and,

The fact that other parts of the boundary line between the two counties may be ambiguous or unascertainable by engineering skill did not justify the Legislature in ignoring altogether that which was clear and unmistakable. It was the duty of the Legislature in attempting to establish the boundary line to follow the statutory description as nearly as practicable, and, if it found it impracticable to follow it at some particular point, then to establish a new line. In doing so, however, it was still its duty to be guided by what it conceived to be the intention of the Legislature which attempted to establish the original line.

(Underlining added)

P. 644

The North Dakota case of Tavis v. Higgins (1968), 157 N.W.2d 718 is similar in many respects to the subject litigation. That action, involving two individuals seeking to quiet title to a tract of land which was affected by avulsive (sudden) changes over the years in the channel of the Missouri River, raised the primary issue of the location of the subject land in relation to the Missouri River when the two counties were created by the territorial legislature in 1873. Disregarding any necessity for exact descriptions, and making its ruling binding only "as between the plaintiff and defendant," that court made the following observations and rulings:

It is undisputed that Lot 5 and the South Half of the Southeast Quarter (S½SE½) of Section 18-138-80 was east of the main channel of the river, and thus in Burleigh County, at the time of the original Government survey in 1872.

P. 724

Where the boundary between two counties is fixed by law as the middle of the stream or channel of a river, such law must be construed as referring to the channel as it existed at the time of passage of the law. An artificial or sudden change by avulsion, or otherwise, in the course of such stream which defines the boundary between two counties, causing a new channel to be formed, does not change the boundary. But where such change is gradual and imperceptible, the rule is otherwise. 20 C.J.S. Counties Sec. 15, p.765 at p.766.

Therefore, having concluded that the defendants have failed to establish that the land claimed by the plaintiffs was gradually and imperceptibly accreted to Morton County, we construe the boundary between Morton and Burleigh counties as fixed by law when such boundary was first established by Chapter 18 of the Session Laws of 1872, Dakota Territory.

P. 726

... a sudden and avulsive change of the main channel caused the property which had so accreted to their Morton County property to be suddenly and abruptly cut off from Morton County and that, as a result, although such land now is east of the main channel, it remains a part of Morton County. The fact that most of the accretion was cut off by the new channel in 1938 by avulsive action would not change the county of its location or ownership.

P.724

The evidence at trial fails to support the Findings of Fact adopted by the lower court, and, even if they are supported in part, they are insufficient factually and legally to justify the Conclusions of Law (which are similarly flawed) for the reason that the evidence conclusively established that the subject property was located south of the Weber River in 1866. Absent a necessary contrary finding, the Judgment must fail for lack of both factual and legal support.

II.

RESPONDENT FAILED TO SUSTAIN ITS BURDEN OF PROVING THAT THE SUBJECT PROPERTY WAS LOCATED NORTH OF THE WEBER RIVER (i.e., SO AS TO PLACE IT IN WEBER COUNTY) AS OF JANUARY 10, 1866.

The Complaint in this action pleaded the Davis County tax deed as the basis for plaintiffs' claim that the title to the subject property should be quieted in them. Thereupon, UDOT filed its Answer setting forth the affirmative defense (among others) that the subject property was located in Weber County and that therefore the Davis County tax sale was illegal and void.

At the Pretrial hearing before Judge Roth on August 4, 1986, plaintiffs Baxter raised the issue of the burden of proof at trial:

THE COURT: I will let you know who the burden falls on.

MR. WARD: It won't make that much difference. All it means who has to really proceed first, doesn't it?

THE COURT:...It is the burden of the party contending, you know, to establish those facts by a preponderance of the evidence. So I will go through your pleadings and decide where I think the burden should be.

(Exh. P-20 at p.45)

On August 6, 1986, Judge Roth issued his Memorandum Decision placing the burden of proof on UDOT:

Page 2
Memorandum Decision
Case No. 74206

Defendant, Utah Department of Transportation alleges, "affirmatively", that the tax sale was invalid because the property

was located in Weber County and that Davis County had no authority to either tax or sell the property. The general rule is that the burden of proof or persuasion as to a fact or issue rests on the party asserting or pleading it. 31A. C.J.S., Evidence, Sec. 104, 29 Am. Jur. 2d, Evidence, Sec. 27.

Therefore, in this case, the burden of proving the location of the property in question lies with the defendant, Utah Department of Transportation.

Dated this 6 day of August, 1986.

s/d David E. Roth
David E. Roth, Judge
(R. 490)

The previously referenced case of Tavis v. Higgins adopts the same rule:

"... Where a defendant in an action to quiet title claims to be the owner of the property and seeks to have title quieted in him, he has the burden of proving the allegations of his claim and, in effect, becomes a party plaintiff."

The same rule is set forth in 12 Am. Jur.2d, Boundaries, Sec. 99, where it is stated that--

" The burden of proof upon an issue as to a boundary is upon the party having the affirmative of that issue. This burden must generally be established by a preponderance of the evidence."

Assuming, without admitting, that an exact description of the location of the Weber River in 1866 cannot be determined at this time and that such fact might conceivably defeat one's right to prevail in the litigation under different facts and circumstances, it is obvious that UDOT's evidence presented at trial and its theory as to the nature of the proof to be presented have combined to completely destroy its case since it failed to prove

that the subject property was located in Weber County in 1866. Nor can it extricate itself from its own trap by attempting to shift its burden to plaintiffs as it attempted to do by side-stepping the issue in the Conclusions of Law (R. 518):

"3. The plaintiff failed to prove by a preponderance of the evidence that the Weber changed its course by sudden avulsive action, so as to leave the property north of the river in Davis County."

(Underlining added)

As a matter of fact, however, all of the evidence conclusively established that the Weber River was north of the subject property in 1866. To have completely changed its course and to shift all of its waters to the south side of the subject property sometime between the last U.S. Survey in 1886 and the first county survey conducted in 1894, whether caused by natural forces or man-made obstructions, constitutes an avulsive change both as a matter of fact and law. The river, which formerly exited Section 25, suddenly exited the Section at a point only 715 feet from the SW corner-- a deviation of 1,562 feet-- and, in the process, moved from the north to the south side of the subject property-- a rectangular parcel of land 826.78 feet long and measuring between 412.88 feet and approximately 411.29 feet in a north-south direction at its respective western and eastern extremities! (See Complaint)

UDOT has not carried its burden of proving that the subject property was located in Weber County in 1866 pursuant to Judge Roth's Pretrial Memorandum Decision. Actually, the Conclusion of

of Law heretofore set forth, which was prepared by UDOT and adopted by the lower Court, in practical effect admits the location of the subject property as being in Davis County (i.e., south of the Weber River) in 1866, but UDOT seeks to extricate itself by shifting to plaintiffs some undefinable standard of burden of proof. But the facts speak for themselves: The distances involved in the channel change are avulsive actions, not changes due to accretion or reliction.

11 C.J.S., Boundaries, Section 34-- Shifting of Channel or Shore ... the general rule is that where, by a sudden or violent change, the channel or shore on which riparian or littoral lands are bounded is shifted, the boundaries of such lands are unaffected, and remain in their original position;..."

72 Am. Jur. 2d, States, Etc., Sec. 27. Changes in channel as affecting boundary.

The effect upon boundaries of a state, where such boundaries are fixed by the middle of the main channel of a river, by the changes in that channel through processes of accretion and avulsion, is dependent upon the gradualness or suddenness of the change; when the course of the river and its channel changes gradually, the boundary follows the channel, but if the river suddenly changes its course or deserts its natural channel, the boundary remains where it was before, that is, in the middle of the altered or deserted riverbed. And the fact that the former channel may have ceased to be navigable does not change the rule. In fixing the boundary along a main navigable channel which has been left dry by avulsion, all that is required is such certainty as is reasonable as a practical matter, having regard to the circumstances."

78 Am. Jur. 2d, Waters, Sec. 411. Generally.

"... But where the change takes place suddenly and perceptibly either by reliction or avulsion, as where a stream from any cause suddenly abandons its old and seeks a new bed, such change works no change of boundary or ownership. Title to land is not lost even temporarily by avulsion.

In most jurisdictions, the character of the stream or body of water as tidal, nontidal, navigable or nonnavigable is immaterial as respects the application of the foregoing rules relating to accretion, reliction, erosion, and avulsion. As elsewhere observed, however, in some civil-law jurisdictions the application of such rules is limited to streams."

See also: Quote from 20 C.J.S., Counties, Sec.15, taken from Tavis v. Higgins, supra.

III.

THE 1894 SURVEY OF THE WEBER RIVER, AS THEN LOCATED DUE TO AVULSIVE CHANGE, DID NOT AND COULD NOT ESTABLISH A BOUNDARY LINE BETWEEN THE TWO COUNTIES DIFFERENT FROM THAT WHICH WAS ESTABLISHED BY THE TERRITORIAL LEGISLATURE ON JANUARY 10, 1866.

None of the U.S. Surveys running north along the west line of Section 25 revealed either an abandoned (or live) river channel until 22.60 chains (1,491.6 feet)-- a minor channel only 26.4 feet wide, and dry in 1871 and 1886-- or the main channel of the Weber River, as shown on all three surveys, at 34.5 chains (2,277 feet). There have been no surveys conducted by the U.S. Surveyor General since June 28, 1886.

The surveyors of the two counties conducted a survey of the boundary line as they perceived it to be, in 1894. The survey was conducted in two parts: first, starting at a point on the Weber River north of Kingstons Fort (located approximately three miles westerly of the subject property) and running west to the shore of

the Great Salt Lake-- the boundary being monumented at intervals-- and, second, a reverse survey running easterly up the Weber River and terminating in Weber Canyon--consisting only of bearing-and-distance courses of the "Meanderings of (the) Weber River." The second portion of the survey was not monumented at any point (See Exh. D-2).

The 1894 survey, for the first time, found the Weber River flowing across the west line of Section 25 at a point only 715 feet north of the SW corner of Section 25. Further, the survey courses placed the Weber River on the south side of the subject property in 1894.

Earl H. Kendell, a life-long resident of the area, testified that for many years he and his brother and father operated a highway gas station and store, known as Kendell's Service, at what became the junction of Highway 30 and 89 when Highway 89 was extended across the general area from south-to-north along the general direction of the west line of Section 25 sometime in the early 1940s (Tr. 115-119--R. 668-672). He pointed out that the old channel of the Weber River forked and ran on both sides of their store and that the abandoned river channel was visible on the south side of their store, and elsewhere nearby (Tr. 133--R.686).

He further testified that from the time he was a young boy there was a large diversion dike which had been constructed across

the Weber River just below the mouth of Weber Canyon (Tr. 121--R. 674). The dike began on a bend of the river at the foot of the hillside below the railroad tracks, and it extended southwesterly for about 1,000 feet, diverting the river in a southwesterly direction (Tr. 121-123--R.674-676). A headgate was placed in the dike so as to divert irrigation water from the river and into the old river channel, where it flowed until taken out downstream to irrigate farm lands in Uintah (Tr. 123-124--R. 676-677).

Mr. Kendell stated that his grandfather, who was born in 1866, told him that he helped to build the rock-wall dike at a time when he was a "good-sized boy, or older--" a logical time frame which would fit between 1886-1984 (Tr. 124-128--R.677-681).

The existing rock dike was sketched on the detail of Utah Highway Department road-construction plans in the year 1927 (Exhs. P-18 and D-25), and a pre-1927 road leading up-river into Weber Canyon hugged the hillside at the northeasterly end of the dike. The diversion dike at the point where the irrigation ditch diversion headgate was installed was located approximately 1,500 feet North and 2,000 feet East of the SW corner of Section 25-- precisely in line with the river channel as surveyed in 1894 and as it and the southwesterly remnant of the rock dike exists today (Cf. Exh. D-4).

It is interesting to note that the 1927 construction plans for the new highway, which ran northwesterly alongside the old river channel, provided for a protective barrier at Station 342 (approx-

mately 1,200 feet northeasterly of the rock dike) where evidence of the old channel had shifted to the south:

"STA.342 PROVIDE DYKE ACROSS OLD CHANNEL 300 C.Y.
UNCLASSIFIED BORROW"

Mr. Kendell testified that the Weber River breached the dike during the flood of 1952, coursed down its old channel and ran on both sides of the Kendell store (Tr. 128-132--R.681-685; and Exhs. P-13 and P-14).

Although the channel change which occurred between 1886 and 1894 appears to have been associated with irrigation activities and/or construction and maintenance of the pre-1927 highway which ran from Ogden up to the mouth of Weber Canyon, it was unnecessary to pinpoint the exact reason for the channel change. Whether due to natural causes or man-made actions, an avulsive change did in fact occur, but the original boundary line between the two counties did not change.

It appears obvious that the surveyors who made the 1894 survey intended and did nothing more than to run a survey of the river where it was then located. They made no attempt to survey the boundary line between the two counties in the area of the subject property as it was established by the legislature; in fact, there is nothing in the survey notes or otherwise suggesting that they were attempting to resolve any uncertainty or dispute involving the common boundary or that they were instructed to locate a disputed or uncertain boundary.

The 1894 survey was pursued primarily by Davis County to assist mapmaker E.A. Vail in preparing a county-wide map " of Davis County, showing School District and Precinct lines,...

(being) in Atlas or book form... to show the Roads of the County, ... all Public Streams,..." (Exh. D--3, excerpted from pp.449 and 451). It would appear that no prior survey of the common boundary line had been attempted by the two counties and that the Weber County surveyor participated in the joint effort to permanently locate the boundary, but there is absolutely no evidence that either county participated in the survey for the purpose of resolving a then-existing boundary-line dispute or uncertainty-- and none can be found. It is conceivable that a few minor problems may have arisen by 1894 whereby the boundary-line location would have been a factor, but the rocky and gravelly land which comprised almost all of the SW $\frac{1}{4}$ of Section 25 must have been deemed almost economically worthless at that time.

For whatever value the 1894 survey may have served, the plain fact remains that neither county ratified or accepted the survey in the area of the subject property as establishing the boundary line. In 1904, some 10 years later, the Weber County Commissioners met with representatives of Davis County and other counties in an attempt to resolve boundary problems, but the effort ended on a sour note (Exh. P-19). Davis County, for its part, refused to

accept the survey inasmuch as it continued to tax those lands located south of the Weber River as it existed in 1866-- as this litigation aptly demonstrates (Ref. Exh. P-7).

Sec. 86.2 Compiled Laws of Utah 1888, effective as of Feb.20, 1978, provided a procedure whereby boundary disputes between counties could be determined by the respective surveyors where an uncertainty or dispute might exist (See Addendum VIII). However, the statute narrowly limited their authority in the following language:

Nothing in this act shall be construed to give the surveyors, mentioned herein, any further authority than to erect suitable monuments to designate said boundaries as they are now established by law.

(Underlining added)

The statute was defective on its face for the reason that it imposed upon the surveyors the necessity of making legal decisions in instances such as illustrated in this case. The constitutional invasion of the doctrine of separation of powers and the built-in risks of violating vested property rights under the Fifth Amendment and intruding upon constitutional guarantees of procedural due process is clearly evident. Even if a boundary dispute or uncertainty can be approached factually, as it is submitted the boundary determination in this matter could have been had the surveyors been assigned to locate the 1866 boundary line, the Utah cases of Barton v. Sanpete County and Summit County v. Rich County make it

abundantly clear that their duty would have been circumscribed by locating the main channel of the Weber River as it existed in 1866. Neither the legislature nor the surveyors can deviate from that mandate.

It is also significant to note that in making the 1894 survey the surveyors erected numerous monuments proceeding west from Kingstons Fort, but in their survey going east and up the Weber River they did not erect a single monument. In his Memorandum Decision Judge Hyde felt that the river itself was a monument, but the statute provided that the surveyors should " erect monuments ." (Underlining added)

The 1878 statute was a make-shift law, and it is therefore understandable that the three Utah boundary-line line cases heretofore cited all chose to completely disregard surveys which were made in each instance purportedly pursuant to the statutory procedure. In recognition of its limitations, and as being indicative of the present misguided opinions of the law held by the respective county surveyors in this case, they filed Affidavits in support of UDOT's Motion for Summary Judgment (R. 294, 298 and 302) wherein each stated that the boundary between the two counties "since at least 1894" was the location of the Weber River as established by the 1894 survey.

It should appear obvious that the legal conclusions in the

two carbon-copy Affidavits, as well as their wording and preparation, were nothing more than the work of counsel for UDOT who, at that stage of the proceedings, was contending that the location of the Weber River at the time of statehood in 1896 should determine the boundary between the two counties (R. 309).

Judge Roth denied UDOT'S Motion for Summary Judgment based on the 1894 survey and its contention that it conformed to the statutory procedure for resolving existing disputes or uncertainties in county boundaries (Addendum I). His ruling directed that the location of the Weber River in 1866 should control. Although the Ruling indicated that plaintiffs should prove the facts as to the location of the river in 1866, his subsequent Memorandum Decision placed the burden of proof on UDOT.

The 1894 survey was not made pursuant to the 1878 statute providing for the resolution of disputed or uncertain county boundaries. The survey did nothing to resolve the basic issues in this case except to prove that an avulsive channel change in the location of the Weber River occurred sometime between 1886 and 1894. As a factual matter, the 1894 survey and the Vail map (Exh. D-6) were most likely the causative factors which were brought into focus and helped to create subsequent boundary-line disputes and uncertainties.

IV.

THE DOCTRINE OF ESTOPPEL BY DEED PRECLUDES RESPONDENT FROM DENYING THE DAVIS COUNTY SOURCE OF TITLE TO THE SUBJECT PROPERTY.

The Conclusions of Law and the Judgment entered in this action both recite that UDOT "is decreed to be the recorded owner of the subject property." And, since UDOT's title must derive from the Warranty Deed which it received from Robert Dansie in 1964, (Exh. D - 23), a closer inspection of that document and the facts and events relating to it are in order.

The 1964 deed, which was prepared by UDOT's predecessor, State Road Commission of Utah, contains two specific recitations which appear for the first time in any title examination: (a) that the lands described therein were located in Weber County, rather than in Davis County, and (b) that Dansie was the owner of the entire 24.41 acres contained in the legal description. The record and the evidence fail to support either claim.

In addition to the prior arguments set forth in this Brief, it should be noted that UDOT took the May 14, 1964 deed to the Davis County Recorder to be recorded, which was done on June 17, 1964. However, Davis County refused to enter on its records that portion of the legal description which was shown as being in "Weber County," and only changed the ownership on its plat maps and records to the small portion of the description-- only 0.87 acre-- set forth in the deed

as being in Davis County (Exh. D -23). The Davis County Recorder was simply complying with long-established procedures and ownership records in her possession. The deed was thereupon taken to Weber County to be recorded, but once again it was rejected until 1970, when it was finally recorded (R. 318).

It is highly unlikely that the Weber County Recorder "held" the deed for a period of six years; rather it seems more likely that it was returned to UDOT or its predecessor. At any rate, since the the format of the deed appears to be flawless, the only logical conclusion which can be accepted for denying recordation are that one or all of the following defects were present: the described lands were not shown on the records and maps as being in Weber County; or the legal description of the lands did not conform to prior descriptions in the chain of title, such as might have existed in Weber County; or that the Weber County maps and records did not show Dansie to be the owner of the described lands. It should be obvious at this point that all three defects existed.

We do not know what prompted Weber County to ultimately accept for recording the deed which it "held" for six years. In any event, after a lapse of another five years-- during which interval UDOT was aware that there were other claimants to the property-- UDOT's counsel in this case once again took the deed to the Davis County Recorder to have it recorded. However, in order to have it accepted,

counsel erased "Weber County" on the two-part description and substituted "Davis County" in its place, thereby reciting that all of the described lands were in Davis County. The deed was recorded in Davis County for the second time on March 31, 1975 (Exh. P-12 and Addendum IX).

An examination of the record in this case reveals a conspicuous absence of exhibits or other believable evidence indicating a Weber County source of title to the subject property. Davis County kept old plat maps (Exh. P-7) and there is a Davis County chain of title, but documents of any kind which even remotely tie the subject property to Weber County are either non-existent or, at best, very vague. The lack of Weber County documentary support and the refusal to record UDOT's deed from Dansie would raise red flags in front of any astute title examiner.

When Judge Gould ordered that Weber County and Davis County be made parties to the lawsuit, Baxters moved for the addition of Monroc, Inc. as an additional party as the successor-in-interest to Utah Sand & Gravel Products Co. (R. 162-169). An examination of Exh. P-7 reveals that Utah Sand & Gravel Products Co. owned the land in the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 25 immediately adjacent to, and south of, the 18-acre tract sold at tax sale to plaintiff Ronald L. Baxter and his two co-purchasers. Judge Gould denied the motion to include that property owner in the litigation.

The Affidavit of Stephen M. Smith, manager of the real property department of Monroc, stated that approximately eight (8) acres of Utah Sand & Gravel lands lie north of the center-line of the channel of the Weber River as it now exists, that its deed to that land extended back to 1945 and that it was recorded with the County Recorder of Davis County, that real property taxes were paid each year since 1945 to Davis County on its lands (including the eight acres located north of the river), that UDOT's deed from Dansie conflicted with Monroc's ownership of the land located north of the Weber River, that Weber County never taxed the eight acres located north of the river, and that UDOT has illegally trespassed on said lands and, based upon information and belief, claims title to them (R.258-259).

In short, the 1964 deed prepared by the State Road Commission of Utah, and signed by Dansie, contained a 24.41-acre blunder which UDOT is now attempting to circumvent by every imaginable defense. That deed included the 18 acres sold by Tax Deed to Baxters and their predecessors, as well as 6.41 acres, more or less, belonging to Monroc, Inc.-- all located in Davis County notwithstanding the avulsive channel change which occurred between 1886 and 1894.

The record in this litigation is devoid of any indication that a Weber County chain of title exists for the subject property. On the other hand, there is a Davis County chain of title. On page 43 of this brief there appears a chronological listing of

CHAIN-OF-TITLE ANALYSIS

1936 Weber County Tax Deed
(R. 402-- Complaint)

1938 Davis County Quit Claim Tax Deed
(R. 402-- Complaint) and R. 404

TASMA P. DANSIE

Tasma P. Dansie v.
Hachmeister, et al.
(R. 401--Complaint)
Quiet Title Action

DECREE QUIETING TITLE

(R. 405), dated 3/26/46
--subject land described as being in Davis County.

Tasma P. Dansie
(Warranty Deed 3/10/61; rec. 4/22/64
in Davis County)(R. 409)

-to-

ROBERT REES DANSIE (and wife)

-to-

-via-

State Road Comm'n of Utah
dated 5/14/64; rec. 3/31/75
in Davis County-- Warranty Deed
Note: Subject land included
in desc. as being located in
Davis County (Exh. P-12)

DAVIS COUNTY

Tax Sale: Non-payment of
1964 real property taxes

DAVIS COUNTY TAX DEED

--dated 5/26/69
(Exh. P-2) Recorded 5/26/69

-to-

Ronald A. Toone (1/3), RONALD BAXTER (1/3), Thomas Hollberg (1/3)
(and wife) (18 acres total) (and wife)

-to-

-to-

Rio Vista Oil, Ltd.

Q. C. Deed 9/24/69
(Exh. P-3)

-to-

Q. C. Deed 9/29/70
(Exh. P-5)
(Subject land)
6 acres

(Subject land)
6 acres

Q. C. Deed (9/25/70
(Exh. P-4)

RONALD A. and SHIRLEY DIANE BAXTER (1/3)
(6 acres)

those documents material to this litigation, covering the time frame since 1938. Every document in the chain of title which includes the subject property recites that the land is located in Davis County, except for the maverick deed from Dansie to State Road Commission of Utah, dated May 14, 1964 and reciting that the property was located in Weber County-- until UDOT's counsel subsequently altered it in 1975 to show its location to be in Davis County.

In addition to fortifying Baxter's claim that the subject property is physically located in Davis County, the documents in the chain of title establish an alternative and independent legal basis which supports their position under the doctrine of estoppel by deed.

Estoppel by deed applies to conveyances in the chain of title to real property in different circumstances and conditions, but, as applied to the facts of this case wherein the critical deviation in the documentary sequence involves a change in the recitals relating to county location, the law is clear-cut and to the point: Where two litigants claim title to the same property through a common-source grantor in the chain of title, both are bound by estoppel from denying material recitals in any conveyance issuing from the common-source owner-grantor.

From Am. Jur. 2d, Estoppel and Waiver:

4. Generally; definition and nature.

Estoppel by deed is a bar which precludes one party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed, or from denying the truth of any material facts asserted in it. Estoppel by deed is technical in nature, and such an estoppel may conclude a party without any reference to the moral qualities of his conduct.

.

Estoppel by deed is a very important aspect of the law of estoppel. By reason of the operation of this doctrine, particularly upon grantors of real property and upon the passage of after-acquired title of such grantors, the effect of the doctrine upon grantees, and the effect and extent of control of recitals in conveyances as an estoppel upon parties thereto and their privies, many important and practical questions affecting the title to real property are controlled to a large extent. A person who is examining the record title to realty should be able to rely on the doctrine of estoppel by deed,...

8. Operation and effect, generally.

Estoppels which run with the land and work thereon are not mere conclusions; they pass estates and constitute titles, and are muniments of title, assuring it to the purchaser. The estoppel which inures in favor of a grantee of land operates in favor of a purchaser from him; where a grantor is estopped by his deed to set up title against his grantee, he is likewise estopped to set it up against the assigns of such grantee. All persons claiming through the parties estopped are equally bound by the estoppel. An estoppel which works on an interest in land runs with the land into whosoever hands

the land comes, and privies who are bound by such estoppel include privies in blood and estate. However, an estoppel by deed is operative only between parties to the deed and their privies; strangers to the deed are not bound by nor can they invoke, the estoppel.

C. ESTOPPEL OF GRANTEE AND PRIVIES

13. Generally.

... A person cannot claim under an instrument without confirming it. He must found his claim on the whole, and cannot adopt that feature or operation which makes in his favor, and at the same time repudiate or contradict another which is counter or adverse to it. A grantor has been held to be estopped to enforce any claim inconsistent with the valid provisions of a deed.

Footnote: A party cannot be permitted to claim both under and against the same deed, to insist on its efficacy to confer a benefit and repudiate a burden with which it has qualified it, or to affirm a part and reject a part. Gibson v. Lyon, 115 U.S.439, 29L.ed 440, 6 S.Ct. 129

.....

In other words he cannot assert that the title obtained from the grantor or through him is sufficient for his protection and not available to his contestant. It has been held that where one entered into the possession of land under and by virtue of a conveyance in fee, with covenants of warranty from another, and retaining that possession, relying upon the grant or possession under it, in aid of his title or possession, he cannot deny the title thus acquired against the grantor and those claiming under him...

15. Claimants under common source of title.

It is the general rule that where two parties claim under the same grantor, each is estopped to deny that the grantor had title or a right to convey. The principle has been stated more fully by the Supreme Court of the United States,

which has declared that where both parties assert title from a common grantor and no other source, neither can deny that such grantor had a valid title when he executed his conveyance. Moreover, it has been held that where each party claims under a common source, each is estopped to attack the title antedating the common source.

.....

It is now the generally accepted rule that when two persons derive title from a common source, one of them is not estopped to assert against the other a paramount title which he has subsequently acquired. He may even admit a common source, and then show that the title presently relied on is a paramount tax title,...

21. Operation and effect of recitals.

As a broad general rule, subject to the qualifications herein discussed, all parties to a deed and those claiming under them are bound by the recital of material facts in the deed. A recital of one deed in another or of a fact in a deed binds the parties and those who claim under them. It is an estoppel which binds parties and privities-- that is, privies in blood, privies in estate, and privies in law...

Estoppel by deed precludes UDOT from denying that the subject property is located in Davis County.

CONCLUSION

The Judgment should be reversed and title to the subject property should be quieted in plaintiffs.

Respectfully submitted,



GLEN E. FULLER

Attorney for Plaintiffs-Appellants

ADDENDUM I

**Judge Roth's Ruling Denying Defendant's Motion for Summary Judgment
Based upon 1894 Survey of Weber River made by County Surveyors.**

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

RONALD L. BAXTER and)	
SHIRLEY DIANE BAXTER,)	
)	
Plaintiff,)	RULING ON MOTION FOR
)	SUMMARY JUDGMENT
vs.)	
)	
RIO VISTA OIL, LTD.,)	
a Utah corporation,)	
)	
Involuntary Plaintiff,)	
)	
vs.)	
)	
UTAH DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Defendant and)	
Third-Party Plaintiff,)	Case No. 74206
)	
vs.)	
)	
ROBERT REES DANSIE, MARIE GROW)	
DANSIE, DAVIS COUNTY)	
COMMISSIONERS, DAVIS COUNTY)	
ASSESSOR, DAVIS COUNTY RECORDER,)	
and WEBER COUNTY, a Body Politic)	
of the State of Utah,)	
)	
Third-Party Defendants.)	

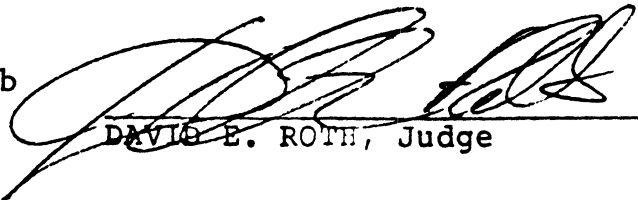
Having heard the arguments of counsel and having reviewed the memoranda on file, I rule as follows:

The boundary between Weber and Davis Counties was established by description in an Act of the legislature of the Utah Territory in 1866. Said description used the main channel of the Weber River as the boundary in the area of the subject property. Plaintiff contends that in 1866, the Weber River was north of the subject property and that the subject property was therefore located in Davis County. Plaintiff further contends that the river later altered its course by a sudden, avulsive action caused by either man-made or natural conditions so as to place the subject lands on the north side of the Weber River. Plaintiff argues that the law provides that where there is a sudden, violent change in the channel of a river that the boundary remains unaffected and remains in the original position therefor, the subject property remains in Davis County.

This issue has not been litigated in an action including the parties that are presently before the Court and plaintiff will be allowed an opportunity to prove the facts they have alleged in support of their claim. Defendant's motion for summary judgment is denied. Plaintiff is to prepare an order consistent with this decision.

DATED this 21 day of May, 1986.

I-b



DAVID E. ROTH, Judge

1 strongly than what the Court did, your Honor. The Court said
2 the boundary was established by description, and Mr. Fuller
3 goes on to say was not only established, but was determined to
4 be the main channel of the Weber River in the area of the
5 subject property. He has gone just that much farther.

6 And secondly, your Honor, he has gone on to further
7 state what the Court then went on to say, the Plaintiffs
8 contentions after that first paragraph. The Court went on and
9 said Plaintiff contends, plaintiff argues, and further--

10 THE COURT: You quarrel with number two as being a
11 correct statement of law?

12 MR. WARD: Well, I don't know it is that easy because
13 there was no main channel of the Weber River. And I think to
14 include that now might prejudice us later on to the effect that
15 the Court has concluded there was a main channel of the Weber
16 River. And we say there was not.

17 THE COURT: Okay, suppose we ask the Jury number one,
18 in 1866, can it be determined there was a main channel of the
19 Weber River at the place in question, yes or no. If you answered
20 yes, was that main channel north or south, answer north or south.
21 Number three, was there evidence of a sudden shift placing it
22 south? Those three issues for the Jury. You call your experts,
23 your surveyors, diagrams, maps. You do the same thing, let them
24 decide it.

25 MR. WARD: In essence, yes.

1 THE COURT: Okay. You agree with that?

2 MR. FULLER: I agree.

3 THE COURT: And as to who has got the burden, I will
4 look at your pleadings and make a determination. Not just--
5 some things you can stipulate. I don't know if you are going
6 to be in the mood to at the time for trial. Now there is a
7 tax sale and tax deed. The question is still going to be who
8 has the burden of proving whether the property is in Weber or
9 Davis. You say because you have got the tax deed, the burden
10 shifts?

11 MR. FULLER: Because they raised it by affirmative
12 defense.

13 THE COURT: Alright, I will look at the pleadings.
14 If you alleged in your Complaint that you intend to prove the
15 property was in Davis County--

16 MR. FULLER: We did not allege that in the pleading.

17 THE COURT: I will look at that and make a decision
18 on that. Anything else?

19 MR. WARD: Well, that's the ruling of the Court on
20 the Order prepared by Mr. Fuller?

21 THE COURT: I don't think it matters. I put it in
22 there unsigned. I will leave it unsigned. I have decided what
23 the trial will be about.

24 MR. WARD: You will leave it unsigned?

25 THE COURT: Leave it in unsigned. My memorandum

decision is the Order.

MR. WARD: That's fine.

MR. HESS: Would it be appropriate to maybe get a transcript of what you just identified and make that--incorporate that into the Pre-trial Order? Is there going to be an Order coming forth now?

THE COURT: A transcript of the three issues that I felt would be submitted to the Jury? Sure.

MR. WARD: Who made the request for Jury trial in this case?

THE COURT: You did.

MR. FULLER: I think both sides probably did.

MR. WARD: Is it too late to withdraw our request?

THE COURT: Not if you haven't paid for it.

MR. WARD: We don't pay anyway.

MR. FULLER: I think Mr. Baxter brought up a juror fee.

THE COURT: You have made a request and paid a fee?

MR. FULLER: Yes.

MR. WARD: We withdraw the request at this time, your Honor. If Mr. Fuller wants to pay the fee, I guess he is entitled to a jury trial. But we withdraw our request at this time.

MR. FULLER: I am sure it has been paid.

THE COURT: You better check. If it hasn't, the jury won't be here. When is the trial?

1 MR. WARD: August 20--where is my book.
2 MR. HESS: 25th.
3 MR. FULLER: I think that's right. 9:30 a.m., that's
4 in the proposed Order.
5 THE COURT: The 25th?
6 MR. FULLER: The 25th.
7 THE COURT: That's a Monday, that's my law and motion
8 day.
9 MR. WARD: No, it is not the 25th, the 26th and 27th.
10 MR. FULLER: I think Jerry did give us the 25th.
11 MR. WARD: I have the 26th and 27th.
12 THE COURT: That's more likely.
13 MR. WARD: Tuesday the 26th. Here is a notice of trial
14 setting signed by Jerry Jensen.
15 MR. FULLER: Tuesday the 26th.
16 THE COURT: Anything else? Alright--
17 MR. HESS: Well, is there going to be a pre-trial
18 Order, you know, as far as the date and time and the issues?
19 I guess I am just interested to get down that Davis County
20 will not be here actively involved.
21 MR. WARD: That's correct.
22 THE COURT: We haven't even gotten to witnesses or
23 exchanging names of witnesses.
24 MR. WARD: Mr. Fuller has already indicated who his
25 witnesses are, and I think I have indicated, not formally, but

1 informally. He never asked, but I have told him who my witnesses
2 are.

3 THE COURT: How many will you have. Mr. Fuller?

4 MR. FULLER: I think we will have four.

5 THE COURT: Four witnesses?

6 MR. FULLER: I think.

7 MR. WARD: He has listed Ron Baxter, Jay Anderson,
8 Geraldine Page and Earl Kendell.

9 THE COURT: And how many will you have?

10 MR. WARD: I haven't added them up. The Weber County
11 Surveyor, the Davis County Surveyor, the Davis County Assessor.
12 The Davis County Recorder, the Davis County Cler, and Jack De
13 Moss, Nick Butcovich and maybe Joe Varoz.

14 THE COURT: Two days going to be enough?

15 MR. WARD: Probably. I don't know if the Court would
16 allow a viewing.

17 THE COURT: I don't know if a pre-trial Order is
18 necessary. Maybe it should be. It will show that defendants
19 agreed that they are not proceeding on their counterclaim against
20 Davis County, that Davis and Weber County will remain as parties
21 to the action, and as between the two counties, will be bound
22 by the decision of the Jury. But that no other parties are
23 bound that are not present.

24 You want it to show that Davis and Weber Counties will not
25 take an active part in the case? I guess you can do that.

1 Pretty much a gentleman's agreement at this point, but I am not
2 sure I can do that and have you bound by the decision. I will
3 leave it up to you. The Court is here, the Jury will be here,
4 the forum is available. If you want to jump in and take a side
5 one way or another, you can do it. If you don't want to--

6 MR. HESS: Well, I think that our people, both Weber
7 and Davis, are going to be involved as witnesses, so probably
8 just with the understanding here that as the Court has outlined.
9 I don't know it needs to be formalized.

0 THE COURT: Three questions will be presented to the
1 Jury, at least it is anticipated that three questions will be.
2 Number 1, is it possible to determine the location of the main
3 channel of the Weber River in 1866 as it applies to the property
4 in question? If the answer to that is yes, then they go to the
5 next question. If the answer is no, the trial of over.

6 Question number 2, is that main channel north or south of
7 the property in question. If the answer is north, then was there
8 a sudden--whatever the language is.

9 MR. WARD: Violent evulsive change.

0 THE COURT: Whatever. I just had in my memorandum
1 sudden shift in the channel to its present location, or some
2 location south of the property in question.

3 MR. FULLER: Would it be appropriate to have an
4 Instruction for the jury as to the position of the two counties
5 in the case? I would think so, that they agree to be bound by

ADDENDUM III

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

RONALD L. BAXTER and)	
SHIRLEY DIANE BAXTER,)	
)	
Plaintiff,)	MEMORANDUM DECISION
)	
vs.)	
)	
RIO VISTA OIL, LTD.,)	
a Utah corporation,)	
)	
Involuntary Plaintiff,)	
)	
vs.)	
)	
UTAH DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Defendant and)	
Third-Party Plaintiff,)	Case No. 74206
)	
vs.)	
)	
ROBERT REES DANSIE, MARIE GROW)	
DANSIE, DAVIS COUNTY)	
COMMISSIONERS, DAVIS COUNTY)	
ASSESSOR, DAVIS COUNTY RECORDER,)	
and WEBER COUNTY, a Body Politic)	
of the State of Utah,)	
)	
Third-Party Defendants.)	

The question presented in this case is: Where was the Weber River in 1866. The boundary between Weber and Davis County was established by description in an act of the legislature of Utah Territory in 1866. The description used the main channel of

the Weber River as the boundary in the area of the subject property. It is the contention of the plaintiff that in 1866 the Weber River was north of the subject property, and the property was, therefore, located in Davis County. Plaintiff further contends the river later altered its course by sudden avulsive action caused by either man-made or natural conditions, so that the subject property lands on the north side of the Weber River.

Plaintiff relies primarily upon three surveys: One in 1855; one in 1877; and a third in 1886. These surveys are of the west border of Section 25. The notes of these surveys show the river crossing the west boundary of the section at different locations, but primarily north of the subject property. The problem with this is that it does not show where the river was, say, 50 feet east of the border. It becomes even further confusing, for example, both Plaintiff's Exhibit 7 and Defendant's Exhibit 7 are plat maps and show the river somewhat north. However, when you take Defendant's Exhibit 8, which is Section 26 bordering 25, the locations of the river are far off, and the plat map in 26 shows the river crossing the border far south of what the plat map in Plaintiff's and Defendant's Exhibit 7 shows. Admittedly, these plat maps are just that, and are undated, but they do show the confusion in regard to the actual location of the Weber River.

The engineers called as witnesses, when asked a direct question: "Can you tell us where the Weber River was in 1866?" would answer, "No". No one channel is shown, nothing is definitive.

It appears that in about 1894, the surveyor of Davis County and a deputy surveyor in Weber County surveyed the river. Their survey shows the river to be, for all intents and purposes, where it is today. This survey was done under a statute that states whenever any dispute or uncertainty shall rise as to any county boundary, the same may be determined by the county surveyors of the counties interested. This appears to be what the 1894 survey between the two county surveyors was. Plaintiff contends that surveyors can only erect monuments, and that they cannot designate or agree upon the boundaries. No evidence that they did anything other than survey in order to clarify the uncertainty. As for the non-erection of monuments as such, the evidence indicates monuments are not generally erected along a river, because a river is generally a monument.

I hold that the preponderance of the evidence shows that an exact location of the river in 1866 cannot be placed. It appears that the river, like the proverbial big gorilla, went wherever it wanted to. The 1855, '71, and '86 surveys of the west section line indicate primarily that the course of the river was subject to change. There is no evidence to show that the

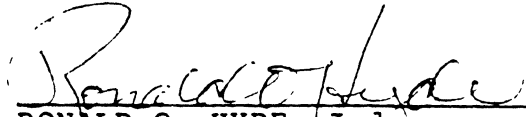
river changed its course by a sudden, avulsive action, so as to leave property north of the river in Davis County. I further hold that there was definitely an uncertainty as to the location of the river, which caused an uncertainty as to the county boundary, and pursuant to this statute, this uncertainty may be determined by county surveyors and this was done in 1894, and that that survey established the boundary between the counties. That survey was just that, a survey of the location of the river, and there is certainly no evidence to indicate that the surveyors made any changes in the river, or did anything other than just survey the river by metes and bounds. The 1894 survey set the river definitely. There being no prior surveys of the river itself, to place the river in a location other than the 1894 survey is just speculation.

I, therefore, hold that the boundary between Davis and Weber Counties being the main channel of the Weber River is as the 1894 survey place the river, which description basically coincides with the present location of the Weber River.

The subject property is and has been in Weber County. The sale by Davis County was invalid and of no effect whatsoever. Plaintiff is, therefore, not entitled to have the title of the real property quieted as against defendants.

Defendant to prepare findings, conclusions and judgment
in accordance herewith.

DATED this 5 day of September, 1986.


RONALD O. HYDE, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of September,
1986, a true and correct copy of the foregoing Memorandum
Decision was served upon the following:

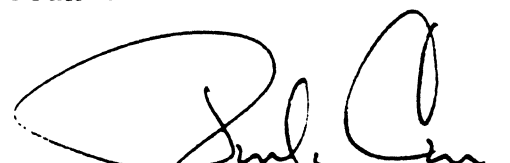
Stephen C. Ward
Assistant Attorney General
Attorneys for Utah Department
of Transportation
124 State Capitol
Salt Lake City, Utah 84114

Glen E. Fuller
Attorney for Plaintiffs
245 North Vine Street #608
Salt Lake City, Utah 84103

Gerald E. Hess
Assistant Davis County Attorney
Attorney for Davis County
County Courthouse
Farmington, Utah 84025

Brent E. Johns
Assistant Weber County Attorney
Attorney for Weber County
7th floor, Municipal Building
Ogden, Utah 84401

III-e


PAULA CARR, Secretary

ADDENDUM IV

DAVID L. WILKINSON
Attorney General
DONALD S. COLEMAN - Bar No. 0695
Chief, Physical Resources Division
STEPHEN C. WARD - Bar No. 3384
Assistant Attorney General
124 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-6684

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

RONALD L. BAXTER and SHIRLEY :
DIANE BAXTER, husband and :
wife, :

Plaintiffs and
Appellants,

vs.

: FINDINGS OF FACT AND
CONCLUSIONS OF LAW

:
RIO VISTA OIL, LTD., a :
Utah Corporation, :

An Involuntary :
Plaintiff, :

vs.

: Civil No. 74206

:
UTAH DEPARTMENT OF :
TRANSPORTATION, :

Defendant, Third- :
Party Plaintiff :
and Respondent, :

vs.

:
ROBERT REES DANSIE and MARIE :
GROW DANSIE, his wife; DAVIS :
COUNTY COMMISSIONERS; DAVIS :

COUNTY ASSESSOR; DAVIS
COUNTY RECORDER; and WEBER :
COUNTY, a Body Politic of :
the State of Utah, :

Third-Party :
Defendants. :
:

The above-entitled matter came on regularly for trial before the Honorable Ronald O. Hyde on the 26th day of August, 1986. The Plaintiffs were represented by Mr. Glen E. Fuller, the Defendant Utah Department of Transportation was represented by Mr. Stephen C. Ward, Assistant Attorney General, the Defendant Weber County was represented by Mr. Brent E. Johns, Assistant Weber County Attorney, and the Davis County Defendants were represented by Mr. Gerald E. Hess, Assistant Davis County Attorney.

Testimony and evidence was adduced by both parties in regard to the issues formed for hearing and trial, namely the location of the boundary between Davis and Weber Counties. The Court having received and considered testimony from various witnesses as well as considering the memoranda and oral arguments and thereupon taken the matter under advisement and being now fully advised in all and singular the law and facts in the premises, does now make and adopt its Findings of Fact.

FINDINGS OF FACT

1. The boundary between Weber and Davis Counties was established by description in an act of the legislature of the Utah Territory in 1866.

2. The description used the main channel of the Weber River as the boundary in the area of the subject property.

3. Three surveys were made along the west border of Section 25 in the years of ^{1855, 1877} 1885, 1877 and 1886. These three surveys show the river crossing the west boundary of the section at different locations.

4. These three surveys referred to in the preceeding paragraphs did not describe the location of the river east of the section line.

5. That in 1894 the surveyors of Davis and Weber Counties surveyed the location of the Weber River. The survey described the River for all intents and purposes, where it is today.

6. The survey was done under statute that states wherein any dispute or uncertainty shall arise as to any county boundary, the same may be determined by the county surveyors of the interested counties.

CONCLUSIONS OF LAW

1. The preponderance of evidence shows that an exact

location of the Weber River in 1866 cannot be determined.

2. The prior surveys indicates that the Weber River was subject to change.

3. The Plaintiff failed to prove by preponderance of evidence that the Weber changed its course by a sudden avulsive action, so as to leave the property north of the river in Davis County.

4. That a definite uncertainty existed as to the location of the Weber River, which caused an uncertainty as to the county boundary, and pursuant to statute, this uncertainty may be determined by county surveyors and was done in 1894, and that survey established the boundary between the two counties.

5. The 1894 survey established the boundary between Weber and Davis Counties as the main channel of the Weber River and the county boundary has remained the location of the Weber River up to the present time.

6. The subject property, the description of which is as follows:

A portion of the South $\frac{1}{2}$ of the North $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section 25, Township 5 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey:

Beginning at a point which is N. $33^{\circ}42'$ W. 1571.1 feet and N. $89^{\circ}48'$ W. 275.34 feet from the South $\frac{1}{4}$ Corner of Section 25, Township 5, North, Range 1 West, Salt Lake Base and Meridian, and running thence: N. $89^{\circ}48'$ W. 826.78 feet along the $\frac{1}{4}$ Section

line of said Section 25, thence North 412.88 feet to the existing highway I-80-N right-of-way line, thence S. 80°03' E. 697.00 feet along said highway right-of-way line to the West right-of-way line of Weber Basin Aqueduct, Station 45+83.51, thence S. 43°13' E. 133.51 feet along said aqueduct right-of-way line, thence S. 46°47' W. 100.00 feet along said aqueduct right-of-way line, thence S. 43°13' E. 177.78 feet along said right-of-way line to the point of beginning.

Containing 6.00 acres.

is and has always been in Weber county.

7. The tax sale conducted on the subject property was invalid and of no effect whatsoever.

8. The Plaintiff is, therefore, not entitled to have the title to the property which is the subject matter of this lawsuit and be quieted as against these Defendants.

9. That the Defendant Utah Department of Transportation is the recorded owner of the subject property.

DATED this 6th day of ^{Oct.}~~September~~, 1986.

BY THE COURT:

s/d Ronald O. Hyde

RONALD O. HYDE
District Judge

ADDENDUM V

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124 State Capitol
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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

RONALD L. BAXTER and SHIRLEY :	
DIANE BAXTER, husband and	
wife,	:
Plaintiffs and	:
Appellants,	JUDGMENT
vs.	
	:
RIO VISTA OIL, LTD., a	
Utah Corporation,	:
An Involuntary	:
Plaintiff,	Civil No. 74206
	:
vs.	
	:
UTAH DEPARTMENT OF	
TRANSPORTATION,	:
Defendant, Third-	:
Party Plaintiff	
and Respondent,	:
vs.	:
ROBERT REES DANSIE and MARIE :	
GROW DANSIE, his wife; DAVIS	
COUNTY COMMISSIONERS; DAVIS :	

COUNTY ASSESSOR; DAVIS
COUNTY RECORDER; and WEBER :
COUNTY, a Body Politic of :
the State of Utah, :

Third-Party :
Defendants. :
:

The above-entitled matter came on regularly for trial before the Honorable Ronald O. Hyde on the 26th day of August, 1986. The Plaintiffs were represented by Mr. Glen E. Fuller, the Defendant Utah Department of Transportation was represented by Mr. Stephen C. Ward, Assistant Attorney General, the Defendant Weber County was represented by Mr. Brent E. Johns, Assistant Weber County Attorney, and the Davis County Defendants were represented by Mr. Gerald E. Hess, Assistant Davis County Attorney.

The Court after making its Findings of Fact and Conclusions of Law hereby makes and enters the following Judgment:

1. That the following described tract of property is and has always been in Weber County, State of Utah:

A portion of the South $\frac{1}{2}$ of the North $\frac{1}{2}$ of the Southwest $\frac{1}{4}$ of Section 25, Township 5 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey:

Beginning at a point which is N. 33°42' W. 1571.1 feet and N. 89°48' W. 275.34 feet from the South $\frac{1}{4}$ Corner of Section 25, Township 5, North, Range 1 West, Salt Lake Base and Meridian, and running

thence: N. 89°48' W. 826.78 feet along the $\frac{1}{4}$ Section line of said Section 25, thence North 412.88 feet to the existing highway I-80-N right-of-way line, thence S. 80°03' E. 697.00 feet along said highway right-of-way line to the West right-of-way line of Weber Basin Aqueduct, Station 45+83.51, thence S. 43°13' E. 133.51 feet along said aqueduct right-of-way line, thence S. 46°47' W. 100.00 feet along said aqueduct right-of-way line, thence S. 43°13' E. 177.78 feet along said right-of-way line to the point of beginning. Containing 6.00 acres.

2. That the tax sale wherein the Plaintiffs purchased the subject property from Davis County was involved is of no effect whatsoever.

3. The Defendant Utah Department of Transportation is decreed to be the recorded owner of the subject property.

4. That the Plaintiffs have no interest whatsoever in the subject property.

DATED this 6th day of October, 1986.

BY THE COURT:

s/d Ronald O. Hyde
RONALD O. HYDE
District Judge

ADDENDUM VI

Excerpts from Certified Copies of Field Notes of Official
U. S. Surveys of West Line of Section 25--Exhs. P-15, P-16
and P-17. Surveys made in 1855, 1871 and 1886.

42

BOOK A-219

243

REPORT:

Filed *November 22nd* 1887

Examined by *John F. O'Connell*

Transcribed by *John F. O'Connell*

Compared by *W. M. Atkinson*

FIELD NOTES
OF THE SURVEY OF THE
Subdivisions

Township No. *5 North*
Range No. *1 West*

OF THE
SALT LAKE BASE AND MERIDIAN
IN
UTAH TERRITORY,
AS SURVEYED BY

Otto C. Salomon

U. S. Deputy Surveyor,

15 Under his Contract No. *154*

Dated *June 28th* 1886

Survey Commenced *October 11th* 1886

Survey Completed *" 12th* 1886

✓ 9-50-12 ✓

DEC 12 1975

CERTIFIED TO BE A TRUE AND EXACT COPY OF THE
ORIGINAL ON FILE IN THE OFFICE OF THE
BUREAU OF LAND SURVEYING,
SALT LAKE CITY, UTAH.

Agnes F. Depretis
RECORDS SUPERVISOR

16 Re-survey subdivisions

15 N. R. & W. S. L. M.

22 Intersect the East Bd of the Sp at the cor to Secs 25 and 36. as established by me under this Contract, thence

Run West on a true ^{re-survey} line bet Secs 25 and 36. with dammed val

Descend

3.00 Foot of Mts

3.11 Found no trace of old cor set a sand stone 15" x 11 x 8" 10" in the ground for 1/4 sec cor marked 1/4 on N face and raised a mound of stones alongside

3.00 Old road bcs N & S.

3.22 The cor to Secs 25. 26 35 and 36.

Land mountainous on 22 ch Bottom on 58 chs Soil 2nd rate sandy and

BOOK-A-219

Re-survey subdivisions 24

15 N. R. & W. S. L. M.

chain gravelly Oak brush on Mountain Sage Brush in bottom

North on re-survey line bet Secs 25 and 36. Val 17° 15' E.

30.25 Road E & W.

35.00 Old bed of River dcs S & W

34.75 Weber River 1.25 chs wide 3 ft deep runs S & W.

36.25 Enter Island

38.25 Leave Weber River

1.00 Chaus wide runs S & W 2 1/2 ft deep.

39.75 N. bank of River

40.00 Found old cor a Quartz 24" x 12" x 6" standing in the ground properly marked with 1/4 on N face, renewed same by raising a stone mound alongside (said Stone agrees)

1871 Survey

North between Sec. 25 and 26,
 Var: 17° E.

25.00	old river bed from top of 11 and 12
34.50	Kober River 1.50 ^{ch} wide floor top of 11
38.00	across Island - 1/2 bend of Kober river 1.25 ^{ch} wide floor S of 11
40.00	Get a quartz stone 24 x 12 x 6 for 2 sec cor
41.25	Top of bench trends E & W.
43.25	U.P. R.R. bears E & W.
54.00	Foot of upper - high bench trends
57.50	Top of same
75.50	Creek valley wide in deep. S. of 11.
80.00	Get a breccia stone 15 x 10 x 4 for cor to sec. 23, 24, 25 and 26. Soil in road nothing bench farming land.
Make a hand-drawn line between No. 23 and 26. Var: 17° 10' E.	
6.00	Creek 5 ft wide S. of 11
15.00	Shadock's House 1.25 ch. South
15.60	road and fence line S. of 11

BOOK A-76

Township 5 N. Range 1 W.

East between Sect's 25 & 26-

18.80 To fence

21.00 To foot of ascent

40.00 Set $\frac{1}{4}$ sect. post. Mound of stones-

65.00 To foot of Mountains. Set post. in mound of stones-

Beginning at Cor. of Sects. 25. 26
25. 27 26-

North between Sect's 25 & 26-

9.00 To road. 50 lks. wide-

22.60 To Weber River. Left bank-

23.00 Cross river to island

32.70 Cross island-

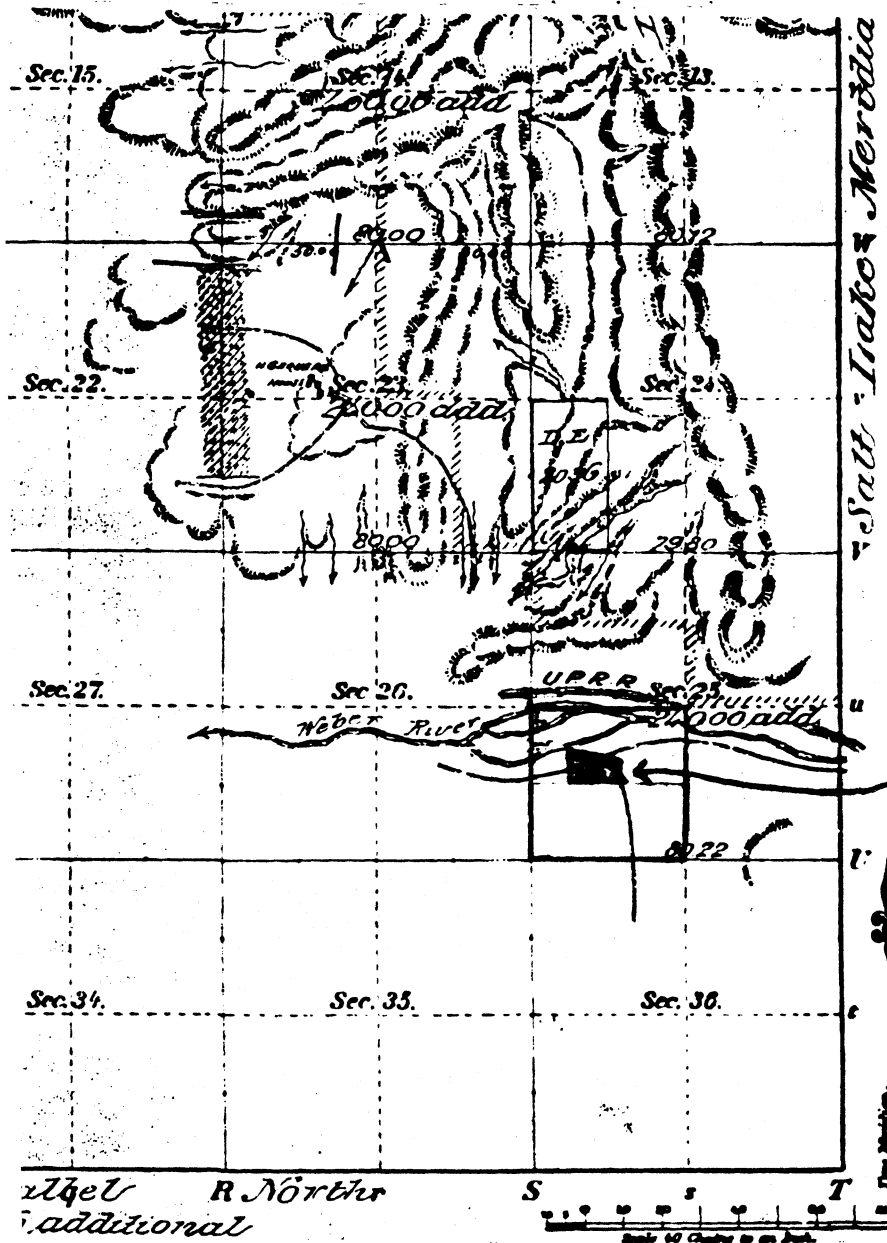
34.50 Cross River. to Right bank-

36.00 To foot of very steep high bluff

ADDENDUM VII

EXHIBIT D-16

1886 Map of portion of Section 25 prepared by Surveyor General "strictly conformable" to the field notes" of the U. S. Survey.



Location of Subject Property
(Superimposed in red)

East

3'

The above Map of Township 12S, Range 1E, North of Range 1E, West of the Salt Lake Meridian, Utah, is strictly conformable to the field notes of the survey thereof on file in this Office, which have been examined and approved.

Surveyor General's Office
Salt Lake City, Utah
October 31st 1897

Ellsworth Dagg
Off. Secy

VII-a

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Utah State Office
University Club Building
138 E. So. Temple
Salt Lake City, Utah 84111

I hereby certify that this reproduction is a copy of the official record on file in this office.

ADDENDUM VIII

BOUNDARY-LINE ~~DISPUTE~~ STATUTE

Sec. 86.2 COMPILED LAWS of Utah
1888, effective as of Feb. 20, 1878

Sec. 86.2 Whenever any dispute or uncertainty shall arise as to any county boundary, the same may be determined by the county surveyors of the counties interested, and in case they fail to agree, or otherwise fail to establish the boundary, the county courts of either or both counties interested, may engage the services of the aforesaid Territorial Commissioner, who, with the said county surveyors, or either of them, if but one appear for that purpose, shall proceed forthwith to permanently determine such boundary line at the expense of the counties interested by making the necessary surveys and erecting suitable monuments to designate said boundaries, which shall be deemed permanent until superseded by legislative enactment. Nothing in this act shall be construed to give the surveyors, mentioned herein, any further authority than to erect suitable monuments to designate said boundaries as they are now established by law. (1)¹¹

410638

~~258781~~

Warranty Deed

Parcel No. 80N-6:16:MS
Project No. 1-80N-6(4)51

ADDENDUM IX

EXH. P-12

Robert Rees Dansie & Marie Grow Dansie, his wife, Grantors,
of Murray, County of Salt Lake, State of Utah,
hereby convey and warrant to the STATE ROAD COMMISSION OF UTAH, Grantee, for the sum of
Seven ~~hundred~~ ^{hundred}, Five Hundred and Eighty-four and no/100ths Dollars,
the following described parcel of land in Davis and Weber County, State of Utah, to-wit:

Two parcels of land in fee for a freeway known as Project No. 80N-6, being part of an entire tract of property, in the SW $\frac{1}{4}$ of Section 25, T. 5 N., R. 1 W., S.L.B.&M. The boundaries of said parcel of land are described as follows:

IN DAVIS COUNTY:

Beginning on the west line of said Section 25 at a point 145.7 ft. radially distant southerly from the center line of said project, which point is approximately 3456 ft. southerly from the NW. corner of said Section 25; thence S. 88° 24' E. 536.17 ft. to a point 120.0 ft. perpendicularly distant southerly from said center line at Engineer Station 51+18.27; thence S. 80° 03' E. 1481.73 ft.; thence S. 49° 05' E. 85 ft., more or less, to the center of the Weber River; thence Southwesterly 2200 ft., more or less, along the center of said river to the west line of said Section 25; thence Northerly 980 ft., more or less, to the point of beginning as shown on the official map of said project on file in the office of the State Road Commission of Utah. The above described parcel contains 24.41 acres, more or less.

ALSO IN DAVIS COUNTY:

Beginning on the south line of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 25 at a point 240.0 ft. perpendicularly distant southerly from the center line of said project, which point is approximately 300 ft. westerly from the SE. corner of said NE $\frac{1}{4}$ SW $\frac{1}{4}$; thence N. 80° 03' W. 200 ft., more or less, to a point 240.0 ft. perpendicularly distant southerly from said center line at Engineer Station 68+00; thence N. 49° 05' W. 150 ft., more or less, to the center of the Weber River; thence Southwesterly 358 ft., more or less, along the center of said river to the south line of said NE $\frac{1}{4}$ SW $\frac{1}{4}$; thence Easterly 640 ft., more or less, along said south line to the point of beginning as shown on the official map of said project on file in the office of the State Road Commission of Utah. The above described parcel of land contains 0.87 acre, more or less.

NOTE: This deed is subject to a U.S.A. pipe line Easement (501-242) Weber Aqueduct.

Any and all water rights pertaining to the above described land are hereby reserved by the grantor, and the grantee shall not be liable for any water assessments now due or which shall become due.



WITNESS, the hands of said Grantors, this 14th day of

May

. A. D. 1864

Signed in the presence of:

Robert Lee Drennon

Marie Grosvenor

STATE OF Utah

County of Salt Lake

1 THE INFORMATION PROVIDED BY THE
2 THE INFORMATION PROVIDED BY THE
3 THE INFORMATION PROVIDED BY THE
4 THE INFORMATION PROVIDED BY THE
5 THE INFORMATION PROVIDED BY THE
6 THE INFORMATION PROVIDED BY THE
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8 THE INFORMATION PROVIDED BY THE
9 THE INFORMATION PROVIDED BY THE
10 THE INFORMATION PROVIDED BY THE

14th FEBRUARY 1964 , A. D. 19 64 , personally

appeared before me Robert Ness Dansie & Marie Grow Dansie, his wife

the signers of the within instrument, who duly acknowledged to me that they executed the same.

My Commission expires:

9.4.62

to me that, they executed the

Notary Public

IX-a